No. 20995

In the

United States Court of Appeals For the Ninth Circuit

GLYNN RICHARD DAVIS, and FLORENCE DAVIS, husband and wife,

Appellants,

v.

WYETH LABORATORIES, INC., a New York Corporation, and AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation,

Appellees.

Appeal from the United States District Court for the District of Idaho Southern Division

Answer to Petition for Rehearing

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Attorneys for Appellants

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Davis vs. Wyeth represents a striking victory for the drug industry. The proposition it set forth to establish was accepted. The standard of safety for a preventative drug is whether the drug is reasonably fit and reasonably safe for use by the public as a whole. Appellants view that the standard be that the drug be safe and fit for him as an individual was rejected. The Court then held that the individual must be warned of the risk to him where the drug house knows, as here, that the physician-patient relationship is absent. To do less than this for a man who has sacrificed for the health of all would be callousness indeed. Subversion of truth in the name of righteousness is nothing new and nothing gained.

The Court does not determine in this case the question of adequacy and method of warning the public except to say that there were many ways in which a warning could have been given by means of advertisements, posters, releases read and signed by recipients of the vaccine or by way of oral warnings. None of these were done in this case. An active advertising campaign was undertaken, participated in by the company, to cause individuals taking the vaccine to believe that it was perfectly safe. If the drug industry can take it upon itself to advise the public of the safety of a vaccine, can it not at the same time warn of the known risks inherent in the vaccine. Safety was the theme of the company's advertisements to the public.

The opinion is carefully tailored to fit the facts of this case and we note the many factual idiosyncracies present and upon which the opinion was based, to-wit:

1. A prescription drug with the knowledge, consent and participation of the drug company was dispensed but not prescribed.

2. With the knowledge of appellee a doctor was not present at the clinic. If he had been, the drug company would have been absolved from liability.

3. There is no legal liability for failure to warn where the drug company does not in fact know of a risk, thus in the instant case there was no liability on the part of the drug company to warn when the drug was first sold.

4. The drug house participated actively in planning the mass immunization clinic program.

5. The drug house furnished press releases, posters and advertising techniques to the medical society, none of which contained a warning.

There was no attempt to decide case by case whether or not the vaccine should be dispensed. It is routine for drug houses to advise the public and doctors of contra-indications of their product. They could easily have done so in this case. The warning could have been contained on the posters and advertisements used, and indeed it would have been a simple matter for Franklin to have warned the pharmacist in West Yellowstone who was in charge of the program. Quite the reverse was done and it was done for business and health reasons. The drug house had a choice. Dick Davis did not, and therein lies the difference and the reason for the opinion.

In paragraph VIII of appellees' Petition for Rehearing, unsupported allegations are made concerning the evidence.

The evidence does not substantiate the statements made on pages 4 and 5 of appellees' Petition. We cite the Court to the following portions of the transcript:

VIII-A. Testimony of Dr. Willis Melcher, page 202, line 8; testimony of Delmar Edward Simpson, page 248, line 20; page 259, lines 11 and 25; page 261, line 10.

B. Testimony of James M. Franklin, page 48, line 14; page 59, line 3, line 20; page 60, line 15; page 74, line 24.

C. Testimony of James M. Franklin, page 48, line 14; page 49, line 15; page 50, line 2; page 74, line 24; page 80, line 9; page 116, line 15.

D. Testimony of Delmer Edward Simpson, page 248, line 20; page 249, line 25; page 259, line 11; page 259, line 25; page 261, line 10.

E. Exhibit with the newspaper clippings is presently before this Court.

F. The pharmacist did not read any literature which accompanied the vaccine bottle. Appellant simply testified that he looked at the vaccine bottle, did not read any cautionary label.

We would, however, reiterate with respect to VIII(f) that Mr. Davis had no knowledge that there was any risk whatsoever in taking the product.

The choices before the court were clear:

1. It could have held that there was no warranty to the individual. No warning need be given and there is no indemnity if the drug is fit for the general public. The minority opinion so held.

2. It could have held there was a warranty of fitness that extends to the individual and the cost of his sacrifice is spread among all who take the vaccine. This view was rejected along with the concomitant theory of the plaintiffs that even so a warning must be given.

3. If the individual is warned, he assumes the risk, and, if stricken, bears the loss. This view was accepted. If not warned, the victim is indemnified.

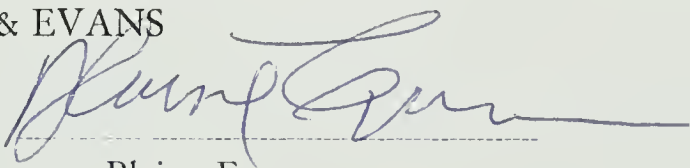
The decision to warn is that of the drug house. Who else could make it? The drug company manufactures the vaccine and routinely determines dosage, usage, and contra-indications. Only the drug house has the sophistication to make decisions of this nature. The extent to which it seeks to avoid responsibility is well demonstrated in point VIII in which they claim that the pharmacist examined the vaccine bottles, the boxes containing the vaccine and the literature containing the warnings. Such was not the case. The druggist was as ignorant of the risk as was Davis. But what if he had known? How could the law let a drug company divest the responsibility for deciding whether or not to warn to a druggist in West Yellowstone, Montana. The court's decision that the druggist must be told and be required to tell of the risk was eminently sound, sensible and fair.

A full trial on the issue of failure to warn was had, consuming some two weeks in length. At the conclusion of the trial the court directed a verdict against the plaintiff, (Tr. P. 923) on this cause of action. The Circuit Court did hold, and the trial court should have held, that there was a failure to warn as a matter of law, as the drug house took the position then, as they do now, that they had no duty to warn and therefore did not warn.

Causation and damages await a re-trial. The issue of legal liability has been resolved against the drug house. The court has advanced the cause of public health while retaining the right of an individual to obtain recourse when a profit making group sells him a product without telling him that there is a risk of contracting the disease that he thinks he is being immunized against.

Respectfully submitted,

ELAM, BURKE, JEPPESEN
& EVANS

By 

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ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged of receipt of three (3) copies of the above and foregoing brief.

Dated: July....., 1968.

EBERLE & BERLIN

By .....

Attorneys for Appellees